

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Petition of SBC Communications Inc. for the)	DA 00-191
Waiver of the Eligibility Requirements of)	
47 CFR Section 24.709 for the PCS)	
Frequency Blocks C and F Auction to)	
Begin on July 26, 2000)	
)	
Reauction of Certain C and F Block Broadband)	
PCS Licenses; Petition by Nextel Communications,)	
Inc. for Expedited Rulemaking or, in the)	
Alternative, Waiver of the Commission's Rules)	
)	

Comments in Opposition

The Office of Advocacy of the United States Small Business Administration ("Advocacy")¹ files these comments in opposition to a petition for waiver filed by SBC Communications Inc. ("SBC") and a petition for expedited rulemaking or waiver filed by Nextel Communications, Inc. ("Nextel"), each seeking big business participation in the upcoming re-auction of Personal Communications Services ("PCS") C-Block licenses, which have been set aside for the exclusive use of small business.

1. Summary and introduction.

For years, Nextel has been circling the C-Block, attempting to sink its teeth into this valuable spectrum. Now, as the Federal Communications Commission ("Commission") prepares to re-auction a large number of C-Block licenses cancelled for non-timely payment, Nextel is

¹ Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305 to represent the interests of small business within the Federal government. *See* 15 U.S.C. §§ 634 (a)-(g), 637. Advocacy serves as a focal point for concerns regarding the government policy as it affects small business. Advocacy develops proposals for changes in Federal policy and communicates proposals to the Federal agencies. *See* 15 U.S.C. § 634(c)(1)-(4). Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the RFA.

trying again. Nextel and SBC asks the Commission to reverse its well-reasoned and thoughtful prior rulings so that they can expand their spectrum and services. Nextel and SBC hope to persuade the Commission that small business has no place competing with big business in the provision of broadband PCS.

Nextel and SBC regurgitate arguments that have been raised in the past, arguments the Commission has repeatedly and rightly rejected, to persuade the Commission essentially that failure by NextWave Personal Telecommunications, Inc. (“NextWave”) to pay for its licenses demonstrates that small business cannot compete.² But NextWave’s failure to pay for its licenses on time does not mean, as Nextel argues, that small business has been afforded a realistic opportunity to provide broadband PCS services or that small business should no longer be granted exclusive access to the C-Block. Nor does it indicate that other small businesses, upon re-auction, would bid sums they cannot afford. In fact, the Commission’s experience from past spectrum re-auctions belies this. Since eliminating installment payments, C-Block licensees have paid for their licenses and many are providing competitive services to customers.

SBC and Nextel argue that their participation in the re-auction will spur competition. This is incorrect. Quite the opposite will occur. SBC is one of the largest PCS operators in the country. Permitting large players to expand their spectrum, or expand their service offerings, at the expense of small business participation, will effectively reduce the opportunity to promote diversity in the marketplace. This is a realistic danger as large companies like SBC continue to merge with other communications service providers.

Increasing the variety of market participants, by including small business, will increase competition on the supply side of the equation. Increasing competition will bring innovative

² NextWave’s licenses constitute the bulk of the spectrum that the Commission plans to re-auction this summer.

products to the marketplace. As for small businesses as customers, when they have but a few large service providers to choose from, their product and service choices are limited and the cost of service is high. High cost and poor service choice have a significant negative affect on small businesses as customers. Small businesses represent ninety-five percent of all American businesses, and small businesses tend to have limited resources, which renders them vulnerable to high prices. Thus, small business customers are in particular need of the benefits of competition in telecommunications, to lower prices and increase choice.

Small businesses play a crucial role in experimentation and innovation, which lead to the development of new technologies and the growth of economic productivity. Small businesses create virtually all new jobs and serve as an essential mechanism for entry by millions of people, including minorities, women, and immigrants, into the American economy. Given the tremendous rate of mergers and alliances between large companies, small businesses are the best hope to provide competition and choice of under-served areas. Congress has recognized this. Congress saw that disseminating spectrum licenses among a variety of applicants, notably small, minority, and women owned businesses, would increase competition and bring innovative technologies to the American consumer. Congress also saw that small businesses (including minority and women owned businesses) do not have ready access to capital or the resources to acquire telecommunications licenses, for reasons unrelated to their ability to provide competitive services. Therefore, Congress directed the Commission to consider special incentives to promote economic opportunities to address financial market imperfections and to compensate for the lack of ready access to capital. With the passage of the Telecommunications Act of 1996, Congress began to unlock doors to telecommunications markets that had long been dominated by one or two large firms.

The Commission should continue to promote Congress's mandate that small business be ensured a realistic opportunity to compete for broadband customers. The Commission has concluded that only insulating small businesses from large business bidding resources will afford small businesses an opportunity to compete in PCS. Nothing that has occurred since 1994, or since last year's C-Block re-auction, has changed this fundamental fact. And the Commission's public policy goal of promoting a competitive marketplace, a premise of the Entrepreneurs' Block, remains valid.

The Commission should not be swayed by argument that re-auction to small business entrepreneurs will not yield the \$8 billion that Nextel would pay for NextWave's licenses. It is unclear what price these licenses will bring upon re-auction, but maximizing revenue is not the goal of the C-Block. Excluding unlimited large business resources is precisely the point of insulating the C-Block. Small business is bringing competition to broadband PCS markets. This trend can and will continue, as existing systems grow their customer base, as new licensees launch systems, and as the Commission re-auctions additional licenses to small businesses. But this trend will stop, and broadband PCS will become the sole domain of large companies, if the Commission pits small business against large business in bidding competition. The Commission should preserve the integrity of its auction processes by offering the subject licenses to small business in accord with its existing rules.

To summarize, small business is the lifeblood of the American economy. Small business telecommunications providers are the ones which can bring innovation to the marketplace, and small business customers are the ones who benefit from competition. Thus, it is vital to the development of an innovative marketplace that the Commission foster the participation of a variety of service providers, not just a handful of national operators. It has been an important

public policy objective of the Commission and of Congress to promote diversity of product and service offerings and to create an atmosphere where many players, including small businesses, women-owned businesses, and minority-owned businesses, can participate in the competitive marketplace.

2. Small business needs exclusive access to spectrum to compete in PCS.

Nextel and SBC argue that small business has difficulty attracting capital. Advocacy agrees, as do Congress and the Commission: “Congress has recognized that “small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit.””³ In fact, it is for this very reason that Congress mandates that the Commission afford small business the opportunity to participate in the provision of wireless services.⁴

The Commission interpreted this congressional mandate to require it to take steps “necessary to ensure that designated entities have a realistic opportunity to obtain broadband PCS licenses.”⁵ The Commission also recognized that while “auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the cost of entry into spectrum-based services.”⁶

Thus, the Commission set aside the C- and F-Blocks for exclusive participation by small

³ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11.

⁴ Congress also requires the Commission to “promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority groups and women.” Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11.

⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 9.

⁶ Id., paragraph 10.

businesses.⁷ In past auctions, the Commission had used other methods, like bidding credits, to ensure small business participation. But it recognized that bidding credits would not be enough to ensure participation by small business in the provision of broadband PCS, “because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high.”⁸ The Commission did “not think bidding credits in an uninsulated block would have a meaningful effect.”⁹ The Commission found that “small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.”¹⁰ And permitting large companies to outbid small businesses would “frustrate Congress’s goal of disseminating licenses among a diversity of licenses.”¹¹ Thus, the Commission set a specific asset cap that it judged would exclude companies that could outbid smaller companies, but still permit participation by companies likely to have the “financial ability to provide sustained competition for the PCS licenses”.¹²

3. The Commission should not deviate from its small business public interest goals.

Nextel and SBC argue the Commission should abandon its policy reserving the PCS C-

⁷ Id., paragraph 12.

⁸ Id., paragraph 96.

⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 131.

¹⁰ Id., paragraph 121.

¹¹ Id., paragraph 123. At least twice in the past, Nextel has asserted that the Commission can provide adequate opportunity to small business through bidding credits. This “would allow [small business] to compete with larger entities that may choose to bid on these returned licenses and would further the public interest by assigning the returned C Block licenses to those who value them most highly and can expeditiously put them to the highest and best use.” Comments of Nextel Communications, Inc., WT Docket No. 97-82, November 13, 1997, page 5. The Commission disagrees.

¹² Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 123.

Block for small business. They argue that market changes since 1994 have altered the Commission's fundamental assumptions about small business competitiveness. But on multiple occasions in the past, the Commission has rejected similar arguments and has repeatedly reaffirmed the C-Block set-aside.¹³ In 1994, the Commission stated,

We do not accept . . . that we should do away with the entrepreneurs' blocks and instead offer bidding credits . . . [I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS.¹⁴

Three years later, the Commission determined that "no party has provided a convincing rationale for deviating from the public interest goals articulated by the Commission [and] the Commission affirms its ruling . . . to limit eligibility . . . to applicants meeting the current definition of "entrepreneur".¹⁵ In August, 1998, the Commission again affirmed its commitment to the entrepreneur's block, again rejecting the arguments Nextel and SBC raise in this proceeding:

Nextel argues that a restricted auction skews the marketplace and that the increasing level of competition in the wireless arena makes it less likely that small business entrepreneurs can survive. According to Nextel, the Commission could enable small businesses to bid competitively by providing them bidding credits No other commenter supports Nextel's views, and several parties oppose them. As stated, we recently denied Nextel's request . . . and the record in this proceeding provides us with no basis to alter our decision.¹⁶

Nextel and SBC again argue that the Commission's original assumptions about small

¹³ See Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82 (1998), Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order, WT Docket No. 97-82 (1997), and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994).

¹⁴ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994), paragraph 16.

¹⁵ Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82 (1998), paragraph 56.

¹⁶ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications

business have changed. But the Commission did not think so in 1994, nor in 1997, nor in 1998. Instead, it has consistently rejected this argument, and nothing relevant has changed in the last two years. The only factors that have changed are these: successful C-Block re-auction to small businesses, increasingly contentious bankruptcy developments, and Nextel's offer to pay \$8 billion for NextWave's licenses. Only the first of these factors would seem to bear on the Commission's public policy conclusions regarding entrepreneur's use of the C-Block, and this factor *supports* the continued insulation from big business bidding competition.

Nextel and SBC argue that the experience with NextWave shows that small business cannot compete against large business in the provision of services such as broadband PCS. But NextWave's failure to satisfy the Commission's payment requirements is no reason to abandon Congress's goal that small business be afforded the opportunity to compete for wireless telephone customers. The failure of one or a few companies to pay for spectrum for which they had bid too high does not equal a failure of all small businesses to compete in the wireless marketplace. Small businesses bring competition and innovation to markets they enter, and small business customers are a chief beneficiary of the increased choices and decreased prices that competition and innovation brings. Today, small businesses are bringing competitive PCS services to the marketplace.

SBC states, "Allowing a non-designated entity like SBC to participate will encourage successful entry of smaller companies because it will increase the likelihood that they will only attempt to enter the markets where they can be competitive."¹⁷ SBC also claims that "[o]pening

Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), paragraph 16.

¹⁷ Petition of SBC Communications Inc. for Waiver of the Eligibility Requirements of 47 C.F.R. § 24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000 ("SBC Petition"), DA 00-191, January 21, 2000, page ii. Nextel agrees with this outrageous proposition: "expanding participation . . . to companies other than designated entities will in no way undermine their opportunity to participate in the reauction." Petition for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules ("Nextel Petition"), DA 00-191,

up the auction will not compromise the Commission's policy of encouraging – on a viable basis – participation by smaller companies.”¹⁸ On the contrary, SBC's participation would destroy the Commission's policy of encouraging participation by smaller companies, except for confining them to markets of no interest to larger companies. Indeed, SBC indicates that large carriers might “focus on larger markets, which will require very substantial outlays of capital, while smaller companies might choose to focus on smaller markets that they can afford to enter”.¹⁹ Large businesses will secure all the spectrum they want because, as the Commission has correctly found, a small business cannot outbid a large business.²⁰

SBC argues that the C-Block set-aside caused small bidders to choose to enter markets where they could not compete. But SBC's evidence for this view is not that these small bidders entered the market and failed to succeed against larger companies. Rather, the small bidders could not afford their licenses, because the ready availability of installment financing encouraged too-high bidding, or because the market price of the C-Block licenses plummeted soon after the auction, or because they simply overbid. In any event, now that installment payments are gone and C-Block licenses have been selling on re-auction to small bidders who can afford them, the upcoming re-auction is unlikely to see above-market bids or a new generation of NextWaves.

The results of previous re-auctions demonstrate that small business is interested in providing broadband PCS and is capable of competing with large business to do so. The

January 31, 2000, page 16. In fact, Nextel argues it “enhances” the ability of small business to participate. Nextel Petition, page 17. Nextel offers no real explanation how this is possible. In fact, Nextel's proposed \$2 billion upfront payment and minimum opening bid for bulk bidding underscores how different a Big Business C-Block Auction would be from the successful C-Block re-auctions the Commission has conducted to date. See Nextel Petition, page 21. Nextel continues to urge that bidding credits are sufficient to ensure small business participation, but as noted, the Commission has repeatedly disagreed. See, e.g. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), paragraph 16.

¹⁸ SBC Petition, page 5.

¹⁹ SBC Petition, pages 16-17.

²⁰ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order,

licensing process has been slow, and PCS is still in its early stages of development, but a number of small operators have launched service in the last year and a half,²¹ and a dozen more plan to begin service in the coming months. Many of these companies will provide service to rural communities, despite Nextel's assertion that smaller companies will not serve these areas.²² And these licenses are all paid in full. Much of what went wrong on the C-Block can be attributed to installment payments. Since the Commission eliminated these, C-Block licensing has proceeded much more smoothly, and re-auction participants have bid amounts well within their means. Even SBC concedes that the Commission's small business policy has been working,²³ but it is important to note that this success has occurred within the context of C-Block exclusivity, not in an atmosphere of big-business bidding competition.

While many PCS markets still have but one or two operating PCS systems, issuing licenses to small businesses will bring competition to these markets as well. The Commission prepares to re-auction licenses for the nation's top markets, and it has a real opportunity to assure that small business has the chance to compete in these markets. To give these PCS licenses to big business, however, will forever drive small business from the largest cities. Thus, it is just as important as ever to provide opportunity for small business, and women and minority-owned business, to compete in the market by guaranteeing their access to spectrum.

4. Maximizing auction revenue is no valid reason to exclude small business from PCS.

Advocacy trusts that the Commission will not be swayed by Nextel's and SBC's deep

PP Docket No. 93-253 (1994), paragraph 121.

²¹ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Fourth Report, FCC 99-136 (rel. June 24, 1999), page 31.

²² See Nextel Petition, page 10. Nextel pledges to provide service to Native American tribal lands (see Nextel Petition, page 11), but large businesses have traditionally ignored service to low income and sparsely populated areas. In Advocacy's experience, local companies, with strong personal ties to the communities, are the ones who will provide telecommunications services, including wireless services, to tribal lands. See Comments of Advocacy, WT Docket No. 99-266, November 9, 1999.

pockets. Permitting big business onto the C-Block to maximize revenue would constitute the greatest imaginable violation of C-Block auction integrity, and would be a tortured interpretation of Congress's will.

But Chairman Kennard recently testified to the U.S. Senate Budget Committee that taxpayers might lose billions of dollars if the Commission accepted NextWave's offer to pay its entire debt of \$4.3 billion, instead of re-auctioning the spectrum.²⁴ In this regard, Chairman Kennard testified that the Commission is still considering Nextel's offer to pay twice this amount for the licenses;²⁵ he also judged the worth of the licenses to be as high as \$10 billion.²⁶ There also have been reports of staff discussions with Nextel regarding how much money Nextel would pay for NextWave's licenses and whether the spectrum should be transferred to Nextel.²⁷

Indeed, one benefit of the Commission's auction program is that it tends to put licenses in the hands of those who value them most highly. Revenue generation is a fortunate by-product of auctioning valued spectrum, and it remains to be seen what price these licenses may bring upon re-auction to designated entities.

But as the Commission realizes, increasing federal revenue is not Congress's goal. Rather, the Telecommunications Act seeks to bring competition, innovation, and diversity to the nation's communications marketplace.²⁸ Issues of auction revenue generation are irrelevant to this objective. Congress directed the Commission to provide competitive opportunities for women, minorities, and small business. The commission decided that the way to do this for PCS

²³ SBC states, "Of course, some designated entities . . . have fared better than NextWave, so [the Commission's policy of encouraging viable small business participation] has already borne fruit." SBC Petition, page 5.

²⁴ Communications Daily, February 14, 2000, vol. 20, number 29.

²⁵ Id.

²⁶ Id.

²⁷ Communications Daily, September 30, 1999, vol. 19, number 189.

²⁸ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11.

(which it expected would involve high capital costs) was to guarantee access to spectrum for small businesses, women-owned businesses, and minority-owned businesses.

Maximizing short-term revenue for the federal treasury should not be the prime goal of the Commission's C-Block re-auction. Providing licenses to "deep pocket" bidders who can pay the most should not be elevated above the public policy goal of assuring opportunity for small business to compete and laying the groundwork for competition in a developing service. Congress never intended that revenue be the prime goal of spectrum auctions. And the Commission did not set aside the C-Block in order to maximize revenue but to permit small business participation in PCS service. Advocacy therefore urges the Commission to reject SBC's and Nextel's bankroll as a reason to abandon its still-valid small business goals.

5. Conclusion

Nextel and SBC offer no sound public policy reason for the Commission to deviate from its C-Block rules in order to permit big business participation in the upcoming re-auction. NextWave's failure to pay for its licenses does not impugn the ability of other small businesses to compete. Nor does it invalidate Congress's and the Commission's legitimate policy of affording small businesses the access to spectrum that will promote competition.

Market shifts and other factors have greatly complicated the fulfillment of Congress's and the Commission's goals for the C-Block, but the underlying rationale is even more strongly justified now. Large businesses so dominate the use of wireless spectrum that the C-Block is the only opportunity small businesses will ever have to compete in broadband PCS. Selling the licenses to Nextel or SBC will increase concentration, decrease competition, and further complete large business dominance of wireless telecommunications. Customers, including small business, will suffer. This will be the last opportunity for the Commission to help structure

competition in this emerging service market. This is no time for the Commission to throw up its hands and permit Nextel and SBC to push small business from the broadband PCS market. The Commission should not let its desire to achieve full value for its spectrum licenses blind it to the fact that small business and the marketplace need this spectrum in 2000 as much as they did in 1994. Entrepreneurial spirit is alive in this country, and small businesses are prepared to compete with Nextel, SBC, and other telecommunications giants.

Respectfully submitted,

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February 22, 2000

Certificate of Service

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